Mohan Singh a/l Lachman Singh v Public Prosecutor

COURT OF APPEAL (KUALA LUMPUR) — CRIMINAL APPEAL NO W-05-28 OF 1999
GOPAL SRI RAM, ABDUL KADIR SULAIMAN AND ALAUDDIN JJCA
2 APRIL 2002

Criminal Law *— Dangerous drugs — Trafficking in dangerous drugs — Possession — Custody and control of dangerous drugs — Whether appellant had exclusive occupation of room in which the dangerous drugs were found — Dangerous Drugs Act 1952 s 39B*

Criminal Procedure *— Trial — Prosecution's case — Accused to only raise reasonable doubt as to the truth of the prosecution's case — Dangerous Drugs Act 1952 s 39B*

Criminal Procedure *— Trial — Prosecution's case — Gaps in prosecution's case — Gaps to be filled by prosecution*

A police raid was conducted at flat No 2-1F, Jalan Gandek, Off Jalan Sungai Besi. The appellant was one of three male persons in that flat. A search of the appellant's person led to the recovery of two keys. The appellant led the police party to another flat — flat No 2-1B. The police party gained access into flat 2-1B by using one of the keys (recovered from the appellant) to open the padlock that secured the collapsible grill at the entrance to the flat. The police party and the appellant proceeded to one of six rooms in the flat. The police used the second key (recovered from the appellant) to gain access to that room by unlocking a padlock that fastened the door to that room. In the room the police recovered two substances which on chemical analysis were proved to be dangerous drugs. The police also recovered a weighing machine, a T-shirt and a pair of jeans which were taken into police custody. A television set and a mattress were also found in the room but were not taken into police custody. The appellant was then taken into custody and formally charged. The police subsequently made four visits to the scene to take photographs. On the third visit, the police entered into the room (where the drugs were found) and found the mattress and television set in place. No photographs were taken during this visit. On the fourth visit, photographs were taken but the bed and television set were no longer in the room. At the appellant's trial, the High Court concluded that the appellant had exclusive jurisdiction of the room in question based on the following considerations: (i) the keys to flat 2-1B were found on the appellant's person; (ii) the accused led the police to the room where the drugs were found; (iii) the defence had not suggested under cross-examination to any of the prosecution witnesses that someone else had access to the room in question; and (iv) the landlady (PW8) testified to the effect that the appellant had rented the room in question. The appellant was accordingly convicted on two charges under s 39B of the Dangerous Drugs Act 1952. On appeal, counsel for the appellant argued that there were several unsatisfactory aspects and gaps in the prosecution case.

Held, quashing the convictions on both charges:

(1) Although the trial judge found as a fact that the police had gained access to the room in question, the finding overlooked the evidence of PW8. She testified that apart from the padlock that secured the door to the room, there was in place an automatic lock fastened to the door. However, the prosecution failed to sufficiently show how the police party gained access to the room when it was secured with an automatic lock. If the door was securely fastened and there were only two keys available, then it was surely for the prosecution to explain how access was gained into the room. The fact therefore that two keys were found on the appellant paled into insignificance (see p 296A–D).

(2) The fact that the mattress and television set were no longer in the room on the police party's fourth visit led to a strong inference, unexplained by the prosecution again, that someone else had access to the room. If it was the landlady (PW8), then the prosecution should have said so by asking her the relevant questions. This was not done (296D–E).

(3) With regard to the direction by the trial judge upon the failure of the defence to put to material prosecution witnesses that someone else might have had access to the room, the record revealed that counsel did in fact ask PW3 whether the police had investigated if someone else had access to the room, to which question a negative response was received. This was sufficient to discharge the tactical burden, if any, that lay on the accused (see p 296E–G); *Alcontara a/l Ambrose Anthony v PP* [1996] 1 MLJ 209 followed.

(4) The burden of proving its case at every stage lies on the prosecution. The only task of the accused is to raise a reasonable doubt as to the truth of the prosecution's case. If there are gaps in the case for the prosecution, these cannot be filled by resorting to a purported failure on the part of the defence to put specific questions relevant to its case. Such gaps must be filled by the prosecution itself (see p 297A-B); *Abdullah Zawawi v PP* [1985] 2 MLJ 16 followed.

[Bahasa Malaysia summary

Satu serbuan polis telah dijalankan di sebuah rumah pangsa No 2-1F, Jalan Gandek, Off Jalan Sungai Besi. Perayu merupakan salah seorang lelaki di rumah pangsa tersebut. Suatu carian ke atas diri perayu menyebabkan terjumpanya dua kunci. Perayu membawa kumpulan polis ke sebuah rumah pangsa yang lain — rumah pangsa No 2-1B. Kumpulan polis telah dapat memasuki rumah pangsa No 2-1B itu dengan menggunakan salah satu dari kunci-kunci tersebut (yang diperolehi daripada perayu) untuk membuka mangga yang mengunci pintu besi yang boleh dilipat pada pintu masuk rumah pangsa tersebut. Kumpulan polis dan perayu terus menuju ke salah satu dari

A enam bilik di dalam rumah pangsa tersebut. Polis telah menggunakan kunci kedua (yang diperolehi daripada perayu) untuk memasuki bilik itu dengan membuka satu mangga yang mengunci pintu bilik tersebut. Di dalam bilik itu polis telah terjumpa dua bahan yang mana atas analisa kimia yang dijalankan terbukti merupakan dadah berbahaya. Pihak polis juga menjumpai sebuah mesin timbang, B sehelai kemeja–T dan sepasang seluar jeans yang mana telah diambil untuk penjagaan polis. Sebuah set televisyen dan tilam telah juga dijumpai di dalam bilik tersebut tetapi telah tidak diambil untuk penjagaan polis. Perayu telah kemudiannya ditahan dalam jagaan polis dan secara rasmi dituduh. Polis kemudiannya membuat empat C lawatan ke tempat kejadian dan mengambil gambar-gambar foto. Pada lawatan ketiga, polis memasuki bilik itu (di mana dadah tersebut telah dijumpai) dan mendapati tilam dan set televisyen masih di tempatnya. Gambar-gambar foto telah tidak diambil ketika lawatan ini. Pada lawatan keempat, gambar-gambar foto telah diambil tetapi tilam dan set televisyen tersebut tidak lagi berada di dalam bilik D tersebut. Di perbicaraan perayu, Mahkamah Tinggi memutuskan bahawa perayu mempunyai bidangkuasa eksklusif bilik yang dipersoalkan berdasarkan pertimbangan-pertimbangan yang berikut: (i) kunci-kunci ke rumah pangsa No 2-1B telah dijumpai pada diri perayu; (ii) tertuduh membawa polis ke bilik di mana dadah tersebut telah dijumpai; (iii) pihak pembelaan telah tidak menyarankan di E bawah pemeriksaan balas kepada mana-mana daripada saksi-saksi pihak pendakwaan bahawa orang lain mempunyai akses ke bilik yang dipersoalkan itu; dan (iv) tuan rumah (PW8) telah memberikan keterangan yang menunjukkan bahawa perayu telah menyewa bilik yang dipersoalkan itu. Perayu telah sehubungan itu disabitkan atas dua pertuduhan di bawah s 39B Akta dadah Berbahaya 1952. Atas F rayuan, peguam bagi pihak perayu berhujah bahawa terdapat beberapa aspek yang tidak memuaskan dan jurang di dalam kes pihak pendakwaan.

G **Diputuskan**, membatalkan pensabitan ke atas kedua-dua pertuduhan tersebut:

(1) Meskipun hakim perbicaraan mendapati sebagai satu fakta bahawa polis telah dapat memasuki ke bilik tersebut yang dipersoalkan, keputusan tersebut mengabaikan keterangan PW8. H Beliau telah memberi keterangan bahawa selain daripada mangga yang mengunci pintu ke bilik tersebut, terdapat kunci automatik yang dipasang pada pintu tersebut. Walau bagaimanapun, pihak pendakwaan telah gagal untuk menunjukkan dengan secukupnya bagaimana kumpulan polis dapat memasuki bilik tersebut sedangkan ianya dikunci dengan kunci automatik. Jika pintu I tersebut ditutup dengan selamat dan hanya terdapat dua kunci, maka sudah pasti terletak pada pihak pendakwaan untuk memperjelaskan bagaimana mendapat akses memasuki bilik

tersebut. Oleh itu hakikat bahawa dua kunci telah dijumpai pada perayu tidak bererti (lihat ms 296A–D).

(2) Hakikat bahawa tilam dan set televisyen tidak lagi berada di dalam bilik tersebut pada lawatan keempat kumpulan polis membawa kepada inferens yang kukuh, yang tidak dapati dperjelaskan oleh pihak pendakwaan sekali lagi, bahawa ada orang lain yang mempunyai akses ke bilik tersebut. Jika ianya merupakan tuan rumah (PW8), maka pihak pendakwaan haruslah memperkatakan sedemikian dengan menanyakan kepada beliau soalan-soalan yang relevan. Hal ini telah tidak dilakukan (lihat ms 296D-E).

(3) Berhubung dengan arahan hakim perbicaraan setelah pihak pembelaan gagal untuk mengemukakan kepada saksi-saksi penting pihak pendakwaan bahawa ada orang lain yang mungkin mempunyai akses kepada bilik tersebut, catatan sesungguhnya mendedahkan hakikat bahawa peguam telah menanyakan PW3 sama ada pihak polis telah menyiasat jika ada orang lain yang mempunyai akses kepada bilik tersebut, yang mana suatu jawapan yang negatif telah diterima baginya. Ini adalah memadai untuk melepaskan beban taktikal, jika ada yang terletak pada tertuduh (lihat ms 296E–G); *Alcontara a/l Ambrose Anthony v PP* [1996] 1 MLJ 209 diikut.

(4) Beban membuktikan kesnya di setiap peringkat terletak pada pihak pendakwaan. Satu-satunya tugas tertuduh adalah untuk menimbulkan satu keraguan wajar berhubung dengan kebenaran kes pihak pendakwaan. Jika terdapat jurang dalam kes bagi pihak pendakwaan, ini tidak boleh diisi dengan berpaling kepada satu kegagalan yang dikatakan oleh pihak pembelaan untuk mengemukakan soalan-soalan spesifik yang relevan kepada kesnya. Jurang sedemikian mestilah diisi oleh pihak pendakwaan itu sendiri (lihat ms 297A–B); *Abdullah Zawawi v PP* [1985] 2 MLJ 16 diikut.]

Notes

For cases on Dangerous Drugs Act 1952 s 39B, see 4 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 126–149.

For cases on prosecution's case, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 4176–4183.

Cases referred to

Abdullah Zawawi v PP [1985] 2 MLJ 16 (folld)
Alcontara a/l Ambrose Anthony v PP [1996] 1 MLJ 209 (folld)
Zahari bin Yeop Baai v PP [1980] 1 MLJ 160 (refd)

Legislation referred to

Dangerous Drugs Act 1952 s 39B

Appeal from: Criminal Trial No 45–46 of 1998 (High Court, Kuala Lumpur)

Gobind Singh Deo (*Karpal Singh & Co*) for the appellant.

Nik Ahmad Marzuki bin Nik Mohamad (Attorney General's Chambers) for the respondent.

Gopal Sri Ram JCA (delivering the Judgment of the court): The appellant was convicted on two charges under s 39B of the Dangerous Drugs Act 1952.

The facts — about which there is no serious dispute — that led to his conviction are as follows. On 3 September 1997, at about 5.30pm, a police raid was conducted at flat No 2–1F, Jalan Gandek, off Jalan Sungei Besi. There were three males in that flat. The appellant was one of them. PW7, who led the raid assisted by his fellow officers, conducted a search of the appellant's person. Two keys were recovered. The appellant then led the police party to another flat No 2–1B. The police officers gained access into that flat by using one of the keys to open the padlock that secured the collapsible grill at the entrance to the flat. That flat had six rooms. The police party and the appellant proceeded to one of these rooms. The police used the second key to gain access to that room by unlocking a padlock that fastened it. In the room they recovered two substances which on chemical analysis proved to be 156g of a mixture of heroin and monoactylmorphines as well as 335g of cannabis.

The search also yielded a weighing machine, a T-shirt and a pair of jeans, all of which the police took into their custody. There were two other items in the room. The police did not take these into custody. These were a television set and a mattress. Apart from the foregoing, no other items belonging to the appellant were found in that room. The appellant was then taken into custody and formally charged. Later the police made four visits to the scene to take photographs. On the third visit they gained access into the room and found the mattress and television set in place. No photographs were taken because they did not have a police photographer with them at the time.

On the fourth occasion, photos were taken. But there is one matter of significance. It is that the bed and television set were no longer there.

At the appellant's trial, evidence was led with a view to prove that the accused had exclusive occupation of the room in question. The learned trial judge concluded that the appellant did have exclusive occupation of the room in question based on four principal considerations. First the keys to flat No 2–1B were found on the appellants person. Second, the accused had led the police party to the room in flat No 2–1B in which the offending drugs were found. Third, because the defence had not suggested under cross-examination, to any of the prosecution witnesses that someone else had access to the room. Fourth, and last, because the evidence of the landlady, PW8, was to the effect that the appellant had rented the room in question.

Counsel for the appellant has taken us through the salient features of the case for the prosecution and has argued that there are several unsatisfactory aspects and gaps in it. It is sufficient that we give prominence to only what we consider to be the salient points highlighted by counsel in his submission.

The first of these relates to the room itself. As we observed a moment ago, the trial judge found as a fact that the police had gained access to the room in question. But what the finding overlooks is the evidence of PW8. She said that apart from the padlock that secured the door to the room, there was in place an automatic lock fastened to the door. No explanation was given; and this is frankly conceded by the learned deputy who appears in this appeal; about this second lock on the door to the room. To put the point plainly, the prosecution failed to sufficiently show how the police party gained access to the room when it was secured with an automatic lock.

The learned deputy however argued that this is not a significant fact. With respect, we do not agree. If the door was securely fastened and there were only two keys available, then it was surely for the prosecution to explain how access was gained into the room. The fact therefore that two keys were found on the appellant, pales into insignificance.

The other salient point that we think we ought to address is the fact that the mattress and television set were no longer in the room on the police party's fourth visit. This leads to a strong inference, unexplained by the prosecution again, that someone else had access to the room. If it was the landlady, then the prosecution should have said so by asking her the relevant questions. This was not done.

Thirdly, there is the direction by the learned trial judge upon the failure of the defence to put to material prosecution witnesses that someone else might have had access to the room. Now, there are two answers to this. In the first place, it must be said in fairness to counsel who conducted the case in the court below, that the point was put to PW3 (Inspector Wan Roslan). That witness was asked whether the police had investigated this issue, namely if someone else had had access to the room. That question drew a negative response. In our view, in the particular circumstances of the present case, that was sufficient to discharge the tactical burden, if any, that lay on the accused. The second answer lies in the judgment of Edgar Joseph Jr FCJ in *Alcontara a/l Ambrose Anthony v PP* [1996] 1 MLJ 209 at p 218, where he said:

> Speaking generally, in a criminal trial, the whole point and purpose of the defence having to put its case to such of the prosecution witnesses as might be in a position to admit or deny it, is to enable the prosecution to check on whether an accused's version of the facts is true or false, and thus avoid the adverse comment, that the defence is a recent invention — in other words, 'kept up its sleeve', as it were — and revealed for the first time when the accused makes his defence from the witness box or the dock, thus detracting from the weight to be accorded to the defence. However, failure on the part of the defence to put its case, as aforesaid, can never, by itself, relieve the prosecution of its duty of establishing the charge against the accused beyond any reasonable doubt.

To that learned observation we would merely add this. The burden of proving its case at every stage lies on the prosecution. The only task of the accused is to raise a reasonable doubt as to the truth of the prosecution's case. If there are gaps in the case for the prosecution, these cannot be filled by resorting to a purported failure on the part of the defence to put specific questions relevant to its case. Such gaps must be filled by the prosecution itself: *Abdullah Zawawi v PP* [1985] 2 MLJ 16. That has always been the law. It is still the law.

We have scrutinized the judgment of the learned trial judge with much care and attention. We are satisfied upon such scrutiny that the learned judge failed to take into account several unsatisfactory features in the case. Had he done so, we are not in doubt that his final conclusion would have been in the appellant's favour.

This is a case therefore, which in the words of so learned a judge, as Hashim Yeop A Sani J, (as he then was), in *Zahari bin Yeop Baai v PP* [1980] 1 MLJ 160 one in which:

> ... it would be wholly unsafe to convict upon such evidence standing alone ...

Our duty therefore plainly lies before us.

The appeal is allowed. The convictions on both charges are quashed. We order the appellant to be set at liberty forthwith.

Convictions on both charges quashed.

Reported by Andrew Christopher Simon